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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

MARY KIRKLAND,

Petitioner,

v.

BAKER-HUGHES OILFIELD OPERATIONS, INC.
d/b/a CENTRILIFT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a Plaintiff alleging age discrimination who has established a prima facie case and presented sufficient evidence for a jury to reject the employer's explanation for layoff must also provide further evidence of discrimination.

What is the scope of review of evidence as to quality and credibility of evidence and whether the Circuit Court can override a jury verdict if the Court feels the evidence was not "enough" under Federal Rule of Civil Procedure 50.

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported as *Kirkland v. Baker Hughes Oilfield Operations, Inc.*, 98-5172 (10th Cir. 2000), and is reproduced in Appendix A. The opinion of the District Court is unreported as *Kirkland v. Baker Hughes Oilfield Operations, Inc.*, 97-CV-142-BU (N.D. Okla. 1998), and is also included in Appendix B.

STATEMENT OF BASIS FOR JURISDICTION

On April 25, 2000, the United States Court of Appeals for the Tenth Circuit entered its Order reversing the jury verdict and judgment in favor of Kirkland and remanded for entry of judgment in Respondent's favor. Rehearing was denied on 31 May, 2000 (App. E), review of that Order is sought under 28 U.S.C. § 1254(1), pursuant to Supreme Court Rule 10(a) and 10(c). The District Court's jurisdiction was premised upon 29 U.S.C. § 629 *et seq.* and jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. Appeal was taken from the District Court's judgment pursuant to jury verdict on November 21, 1997.

STATUTORY PROVISION INVOLVED

This case involves the required proof in cases alleging age discrimination under 29 U.S.C. § 621 *et seq.* (ADEA), and the scope of review by the court under Federal Rule Civil Procedure, Rule 50.

STATEMENT OF THE CASE

Mary Kirkland worked for the Respondent continually since 1975 until terminated on April 22, 1994. She also worked for the Respondent's predecessor from 1962 to 1968.

During the full term of her employment, Kirkland was never given less than a satisfactory performance appraisal.

When Respondent terminated Kirkland in April 1994, her position was filled by a person more than 16 years younger than her. This replacement had been hired within the previous year and moved into the department working with Kirkland in the fall of 1993. Upon moving into the department the replacement employee began training for Kirkland's position in accounts payable.

The Respondent gave several different reasons that Kirkland was terminated instead of the replacement:

1. She was not cross trained;

2. She was a doer and not a thinker;

3. She did not desire to learn computer skills;

4. A down turn in business caused layoffs.

The jury heard testimony that refuted every reason given by the Respondent. The jury also heard Carol Whitlock's testimony, a present employee at the time of the trial, who felt that the Respondent discriminated in its employment practices. Rhonda Tygert another employee in charge of computer training at the time of trial testified that she thought Respondent discriminated against Petitioner because of age. After trial to a jury, a verdict was rendered in favor of Kirkland in the amount of $45,029.81.

The Respondent's motion for judgment as a matter of law under Fed. R. Civ. Pro. 50 was overruled by the District Court.

The Circuit Court admitted that Petitioner, Kirkland, had proven her *prima facie* case, but reversed the District Court, holding the Respondent was entitled to judgment as a matter of law under Fed. R. Civ. Pro. 50. The Circuit Court re-weighed the evidence and found that the evidence was not "sufficient to demonstrate that Respondent discriminated against her on the basis of age".

Petitioner, Kirkland, seeks review of this Court on the question of scope of review of the Court under Rule 50 and the necessity of production of evidence over and above proof of a prima facie case and evidence believed by the jury to disprove the Respondent's explanation.

REASON FOR DENYING THE WRIT

Certiorari is most appropriate here to instruct the Circuit Court concerning the scope of their review under Fed. R. Civ. Pro. 50, and, also, to instruct the Court as to its ability to re-weigh the evidence and decide whether there is "enough" evidence notwithstanding Petitioner's proof of prima facie case and disproof of Respondent's explanation.

Certiorari is generally favored and needed here to administer and properly construe the ADEA statutes. *United States v. Ruzicka*, 329 U.S. 287, 288 (1946); *United States v. Donovan*, 429 U.S. 413, 416 (1977).

Because of the need for proper administration and construction of this Federal Statute and the significant underlying public policy implications, Petitioner, Kirkland, prays this Court to grant certiorari to resolve this important issue.

This Tenth Circuit opinion conflicts with the Eighth Circuit opinion of *Gaworski v. Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir.), *cert. denied*, 115 S. Ct. 355 (1994), making certiorari further appropriate. It also is in direct conflict with the recent *Reeves v. Sanderson Plumbing Products, Inc.*, U.S. Supreme Court case #99-536, decided June 12, 2000.

I. THIS TENTH CIRCUIT OPINION CONFLICTS WITH THE EIGHTH CIRCUIT DECISION AND RECENT UNITED STATES SUPREME COURT OPINION

The Eighth Circuit found that it was not necessary to produce evidence to find intentional discrimination after proof of *prima facie* case and disproof of employer's proffered reasons. *Id. Gaworski* at 1104.

The Tenth Circuit in this case stated that Petitioner failed to produce evidence sufficient to demonstrate that Respondent discriminated against her on the basis of age notwithstanding the Tenth Circuit's admission that Petitioner proved her *prima facie* case. The recent United States Supreme Court Case of Reeves, *Id.*, also conflicts with the decision of the Tenth Circuit. In the Reeves case justice Ginsberg felt that another case might allow the Court to "further elaborate in an appropriate case". The Petitioner, Mary Ellen Kirkland asks this Court to further elaborate.

II. AN EXPLANATION IMPEACHED CAN MEAN DISCRIMINATION — CONFUSION AT TENTH CIRCUIT

A jury returned a verdict in favor of Petitioner. The jury weighed the evidence. The ultimate question of liability should not be taken from the jury.

During the trial, Respondent's Motion for judgment as a matter of law pursuant to Rule 50 was denied. The court present weighed the evidence and law. The credibility and weighing of evidence should be left with trial judges.

After trial on August 7, 1998, over four years after Petitioner, Mary Ellen Kirkland's, termination the trial court again denied the Respondent's Rule 50 Motion.

The Tenth Circuit again re-weighed the evidence to try and find something that seldom exists -- independent evidence of discrimination. The jury did not believe the evidence and witnesses presented by the Respondent to prove their explanation of termination. That is enough. The jury said, Respondent's actions were not wilful but the evidence and testimony that the jury heard was full of reckless disregard for the law and the Petitioner, Mary Ellen Kirkland. The trial jury and the trial Judge did render a verdict that the Respondent used age as "a" determining factor, then the Tenth Circuit asks whether there has been "enough" evidence presented, for what? To prove a wilful case that was not allowed by the jury?

Does the Tenth Circuit believe it needs to help the jury to decide whether the Respondent's explanation is believable? The Tenth Circuit admits that Petitioner proved her *prima facie* case.

The ADEA is a safety net. It catches employees that might otherwise fall to the side and rust away as a used up piece of machinery. The ADEA was enacted to protect 58 year old women like Petitioner, Kirkland, before she falls to the side for 6 years while the courts re-weigh evidence needlessly doing damage to not only the Petitioner, but the

intent and spirit of the law. The law should provide quick relief which can only be done in the Tenth Circuit if this Court decides to once and for all make it clear. The line of cases from *McDonnell Douglas v. Green*, 411 U.S. 792, to *St. Mary's Honor Center v. Hicks*, 1173 S. Ct. 2742 (1993), to *Randall v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995) (which that circuit seems to now disregard without specifically overruling its own guidance in footnote 17 that the "En Banc Court has unanimously adopted this panel's holding . . . All of our cases or parts of cases inconsistent with the Rule announced herein are overruled") seem to clearly say something that the Tenth Circuit still struggles with and continues to be in conflict. Randall seems to make it clear that the law of the circuit would be not to require some affirmative evidence of discrimination after the finding of pretext by the jury.

Let this Court make it clear to every circuit that it is not the Circuit's job to re-weigh the evidence as presented to the jury and trial court. This Court's guidance will again pull the safety net, and the rule and intent of law will be made clear, not only to the courts and lawyers, but to the employees and employers in order that the privileges of all will be promoted and better guided to smooth operation of business and the pursuit of happiness by the individuals.

In this case the Tenth Circuit's struggle and confusion over ADEA cases and its scope of review has moved the Circuit to disregard what the trial court saw clearly. A judgment as a matter of law is improper unless the proof is all one way, or so overwhelming preponderant in favor of the moving party as to permit no other rational conclusion. *Green v. Safeway Stores, Inc.*, 98 F.3d 557 (10th Cir. 1996). Judgment as a matter of law is appropriate "only where the

evidence points and all inferences to be drawn therefrom are so clear that reasonable minds could not differ on the conclusion". *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 385 (10th Cir. 1985). The Tenth Circuit should swiftly and summarily reject requests to review cases like this one. The Tenth Circuit continues to revisit the ADEA cases without any real direction to their review except confusion and contradiction.

This Court should grant certiorari to correct the confusion between the circuits and at the Tenth Circuit and not only to resolve conflict between the courts, but also to better administer the law of the ADEA to meet the intent and purpose of that statute in guiding and protecting employers and employees. *Reeves v. Sanderson Plumbing, Inc.*, U.S. Supreme Court Case No. # 99-536 recently gave some explanation but not full resolution of the conflict and confusion at the Tenth Circuit.

CONCLUSION

WHEREFORE, Petitioner, Mary Ellen Kirkland, prays this Court to issue a writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 25, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-5172
(D. Ct. No. 97-CV-142-BU)
(N.D. Okla.)

MARY ELLEN KIRKLAND,

Plaintiff – Appellee,

v.

BAKER-HUGHES OILFIELD OPERATIONS, INC., sued on original petition as: Baker-Hughes, Inc., a Delaware corporation d/b/a Centrilift,

Defendant – Appellant.

ORDER AND JUDGMENT*

Before **TACHA**, **BRISCOE**, and **ROGERS**,† Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

† The Honorable Richard D. Rogers, Senior District Judge for the District of Kansas, sitting by designation.

Appendix A

Defendant-appellant Baker-Hughes Oilfield Operations, Inc. appeals the district court's denial of its motion for judgment as a matter of law. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse.

I.

By late 1993 or early 1994, defendant knew that its revenue was going to decline due to an anticipated drop in its export business with Russia. Defendant informed all of its departments that they had to decrease costs and expenses in order to maintain profitability and gave each department a cost reduction target. Ultimately, defendant determined that a reduction-in-force (RIF) was necessary. On April 22, 1994, defendant fired plaintiff-appellee Mary Ellen Kirkland as part of the RIF. At the time, she was fifty-eight years old. Kirkland filed suit, claiming that defendant discharged her in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1).

The evidence at trial tended to establish the following facts. Kirkland worked for defendant from 1962-1968 and from 1975-1994. At the time of the RIF, she was an accounts receivable clerk in the accounting department. During her tenure with defendant, Kirkland never received a less than satisfactory performance appraisal and was never reprimanded. Carol Millett, one of Kirkland's supervisors, and Joe Mitcho, a vice president of human resources, both testified that Kirkland was doing a satisfactory job when she was fired. Sylvia Mitchell, one of Kirkland's co-workers, also testified that Kirkland was qualified for her job and could have been trained to do the accounting work that remained after the RIF.

Appendix A

Kirkland's 1990 performance appraisal states that she could perform some of her manual tasks faster and more efficiently on a computer. The appraisal instructs Kirkland to take steps to obtain any necessary training. Kirkland's 1991 performance appraisal also indicates that she needed to develop ways to make her job more streamlined and efficient. Furthermore, in 1991, Kirkland made it her own goal to become more involved with the personal computer, WordPerfect and Lotus 1-2-3 so that she could become a more efficient employee.

At trial, Kirkland testified that she had no qualms about the computer and never refused computer training. Although she signed up for in-house computer training and asked numerous supervisors for computer training, Kirkland testified that she was unable to obtain it. Consequently, she asked other employees to help her learn and she taught herself. Along with her co-workers, Kirkland also spent approximately one hour obtaining certification to use a software application for accounting.

Kirkland admitted that she neither automated her manual tasks after the 1990 performance appraisal nor made any effort to learn computer skills on her own outside of work. While defendant offered only limited in-house computer training prior, it did support an education reimbursement program to encourage employees to seek outside training. Kirkland did not take advantage of this program. She did enroll in a Lotus 1-2-3 class at a vocational school but did not complete it because the material was too advanced for her.

Appendix A

At the time of the RIF, Pam Hoagland also worked in the accounting department as an accounts payable service center processor. A temporary agency hired Hoagland to work for defendant in September 1993. By December of 1993, defendant was behind in paying its invoices and hired Hoagland as a regular payroll employee to work in accounts payable. Eventually, Hoagland began training to do Kirkland's job. After defendant fired Kirkland, Hoagland assumed the accounts receivable position. Hoagland was 42 years old at the time.

Hoagland did not have a college degree or any formal accounting training. She had worked in a bank doing bookkeeping and balancing checkbooks and the bank's budget. She also had taken two computer classes at a state college and worked on a computer system at another company. Hoagland's 1994 performance appraisal indicated that, overall, she needed improvement, but also noted that she met expectations in automating procedures. Millett testified that it would have been unfair to give Hoagland a satisfactory review in 1994 because Hoagland was a new employee and she was still learning her job.

In making its RIF decisions, defendant retained the employees with the best qualifications to complete the remaining work. Seniority was considered only if two employees were equally qualified. Defendant's managers testified that they selected Kirkland for the RIF because she (1) failed to automate the manual functions of her job, (2) lacked the skills to handle the post-RIF computerization of all accounting work, (3) was satisfied with the status quo and not interested in change, and (4) did not demonstrate a

willingness to make her job more efficient. Kirkland testified that she believed she was fired because of her age. Rhonda Tygart, one of defendant's computer instructors, also testified that she believed Kirkland was fired due to her age.

Testimony further indicated that defendant retained Hoagland because (1) she could function in both accounts payable and employee receivables, (2) she showed both the willingness and the potential to do different jobs, and (3) she had experience with computers. After the RIF, Hoagland made the accounts receivable job more efficient by automating several tasks and eliminating redundant functions.

At the close of plaintiff's evidence, defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). The district court denied defendant's motion and the jury returned a verdict for plaintiff. In a post-trial motion, defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and the district court again denied defendant's motion. Defendant filed a timely appeal.

II.

We review de novo the denial of a judgment as a matter of law. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996). We "apply the same legal standard as the district court and construe the evidence and inferences in the light most favorable to the nonmoving party without weighing the evidence, passing on the credibility of witnesses, or substituting our judgment for that of the jury." *Id.* Judgment as a matter of law is proper "only where the

evidence and all inferences to be drawn therefrom are so clear that reasonable minds could not differ on the conclusion." *Id.* (internal quotation marks and citation omitted).

The ADEA provides in pertinent part that it is "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). We evaluate ADEA claims based on indirect evidence of discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165 (10th Cir.), *cert. denied*, 525 U.S. 1054 (1998). To establish a prima facie case of age discrimination under the ADEA, a plaintiff who is discharged in a RIF must prove that (1) she is within the protected age group, (2) she was doing satisfactory work, (3) she was discharged despite the adequacy of her work, and (4) there is some evidence the employer intended to discriminate against her in reaching its RIF decision. *Id.* The fourth element is satisfied if the plaintiff "held a similar position to a younger retained employee." *Id.* at 1167.

If the plaintiff makes out her prima facie case, then she "creates a presumption of discriminatory intent that the defendant may rebut by asserting a facially nondiscriminatory reason for the employee's termination." *Id.* at 1165. Once the defendant advances a legitimate reason for its decision to fire the plaintiff, the plaintiff can prevail only if she presents evidence that the defendant's proffered reason is pretextual. *Id.*

In this case, there is no question that Kirkland established the first three elements of her prima facie case: (1) she is a

member of the protected age group, (2) members of management testified that she was doing satisfactory work when she was fired, and (3) defendant laid her off despite the adequacy of her work. In addition, Kirkland and Hoagland both worked in the accounting department, Hoagland was learning Kirkland's job at the time of the RIF, and Hoagland was younger than Kirkland. Thus, it appears that Kirkland held a similar position to a younger retained employee. We therefore will assume that Kirkland also satisfied the fourth element of her prima facie case.

However, "the existence of a prima facie case does not necessarily preclude judgment as a matter of law" against Kirkland. *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 977 (10th Cir. 1996).

> [A]fter a full trial on the merits, the sequential analytical model adopted from *McDonnell Douglas* . . . drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against [her] on the basis of age.

Fallis v. Kerr-McGee Corp., 944 F.2d 743, 744 (10th Cir. 1991). Thus, the verdict in this case can stand only if Kirkland presented enough evidence for a reasonable jury to conclude that age was the determinative factor in her discharge.

Kirkland contends that the evidence supports the jury's verdict because it shows that defendant conspired to replace her in the summer of 1993, hired Hoagland (her replacement)

in the fall of 1993, and then used an unnecessary RIF to effectuate its scheme. She argues that the evidence proves she was doing a good job when she was laid off and that she was as qualified as Hoagland for the post-RIF accounts receivable position. Kirkland thus insists that a reasonable jury could infer that defendant fired her because of her age. We conclude, however, that Kirkland offered no credible evidence of age discrimination to support her conspiracy theory.

First, although Kirkland presented evidence that defendant held meetings in the summer of 1993, she offered no proof that defendant planned her termination and replacement at these meetings. Second, uncontroverted testimony at trial showed that the accounting department was behind in late 1993. Consequently, in December 1993, defendant converted Hoagland from a temporary employee to a regular payroll employee and placed her in the accounting department. Thus, Kirkland did not demonstrate that defendant hired Hoagland to replace her or that defendant was already planning to discharge her in a RIF when it hired Hoagland. *See Doan*, 82 F.3d at 977 (finding that pre-RIF hiring is not evidence that a RIF "was merely a pretext for pruning away unwanted employees" where the defendant's managers were unaware of the upcoming RIF when they hired the new employees).

Third, the evidence showed that defendant's export business declined in late 1993 or early 1994 and, as a result, defendant experienced a drop in revenue. Eventually, defendant determined that a RIF was necessary. Kirkland challenged the necessity of the RIF by presenting evidence

that defendant was financially healthy and profitable. As we have said before, "the wisdom of a RIF is not for a court or jury to decide. A RIF is a business decision, and the ADEA is not a vehicle for reviewing the propriety of business decisions." *Id.* (internal quotation marks and citation omitted). Accordingly, Kirkland's financial evidence is not probative.

Fourth, ample evidence demonstrates that defendant laid off Kirkland and retained Hoagland because defendant believed that Hoagland was more qualified to handle the post-RIF computerization of all accounting work. Specifically, Hoagland was multi-faceted, showed willingness to do different jobs, and had experience with computers. By contrast, Kirkland did not automate her manual tasks or complete outside computer training despite her 1990 and 1991 performance appraisals. The evidence thus showed that Kirkland did not have the necessary computer skills or the willingness to obtain those skills, and that defendant therefore selected her for the RIF. We recognize that there may be a correlation between age and computer skills, but this does not mean that computer proficiency cannot be used as a RIF selection criterion.

Despite the evidence, Kirkland claims that a reasonable jury could have found that defendant violated the ADEA based on her own testimony and that of Rhonda Tygart, a computer instructor. Kirkland also relies on the testimony of Sylvia Mitchell and others that she was as qualified as Hoagland and trainable. However, even if the jury believed Kirkland's assessment of her own performance and the testimony of her co-workers, the jury was not free to conclude

that defendant impermissibly discharged Kirkland absent any other evidence of age discrimination. *Fallis*, 944 F.2d at 747 (finding that the plaintiff's own testimony and that of his co-workers was not enough to support a jury verdict in his favor without additional evidence of age discrimination over and above his prima facie case); *see also Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance.")

We have carefully reviewed the record in this case and construed the evidence and inferences in the light most favorable to Kirkland. We find that she has failed to produce evidence sufficient to demonstrate that defendant discriminated against her on the basis of age. We therefore hold that the district court erred in denying defendant's motion for judgment as a matter of law.

Kirkland's request for appeal-related attorney fees is DENIED.

REVERSED and REMANDED for entry of judgment in defendant's favor.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED AUGUST 7, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 97-C-142-BU

MARY ELLEN KIRKLAND,

Plaintiff,

vs.

BAKER HUGHES OILFIELD OPERATIONS, INC., d/b/a CENTRILIFT,

Defendant.

ORDER

This matter comes before the Court upon Defendant's Motion for Judgment as a Matter of Law. Plaintiff has responded to the motion and upon due consideration, the Court makes its determination.

Plaintiff brought this action against Defendant pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, alleging that Defendant had terminated her employment in violation of the ADEA. A jury returned a verdict in favor of Plaintiff. During the trial, Defendant moved for a judgment as a matter of law pursuant to Rule 50(a), Fed. R. Civ. P., which was denied by the Court.

Appendix B

In the instant motion, Defendant renews its motion in accordance with Rule 50(b), Fed. R. Civ. P. As grounds for its motion, Defendant asserts that (1) Plaintiff failed to prove that she was similarly situated with any employees retained in her department, that she was qualified for any of the jobs remaining in the department after the reduction in force because the jobs were changed, and that she was replaced; (2) the opinion of co-workers from other departments concerning Plaintiff s qualifications to be retained were entitled to no weight because each admitted they had no personal knowledge of the new qualification requirements for retention; (3) the opinion of a co-worker from another department that age had to be the motivating factor in choosing Plaintiff for layoff was entitled to no weight because she admitted she had no personal knowledge of the new qualification requirements for retention or of the factors considered in retention decisions; and (4) even if Plaintiff met her burden of proving discriminatory age discrimination, she was not entitled to any back pay because she failed to mitigate her damages.

Judgment as a matter of law is appropriate " 'only where the evidence points and all inferences to be drawn therefrom are so clear that reasonable minds could not differ on the conclusion.' " *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996) (quoting *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 385 (10th Cir. 1985)). Unless the proof is all one way or so overwhelmingly preponderant in favor of the moving party as to permit no other rational conclusion, judgment as a matter of law is improper. *Greene*, 98 F.3d at 557. In determining whether judgment as a matter of law is appropriate, the district court

must view the evidence and inferences in the light most favorable to the non-moving party without weighing the evidence, passing on the credibility of witnesses or substituting the district court's judgment for that of the jury. *Id.*

Mindful of the above-stated standards, the Court finds that Defendant's motion should be denied. The Court finds that there was sufficient evidence in the record to permit a reasonable jury to conclude that age was a determining factor in Plaintiff's termination. The Court rejects Defendant's arguments that Plaintiff failed to meet her burden of proof.

As to the issue of mitigation of damages, it is well-settled that an employee claiming entitlement to back pay is required to make reasonable efforts to mitigate damages. *United States v. Lee Way Motor Freight*, 625 F.2d 918, 938 (10th Cir. 1979). A claimant is required to make only reasonable exertions to mitigate damages, however, and is not held to the highest standards of diligence. *Id.* Once back pay and benefits have been awarded, the employer has the burden of showing that the claimant did not exercise reasonable diligence in mitigating damages caused by the employer's illegal action. *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). In order to satisfy this burden, the employer must establish (1) that there were suitable positions available which plaintiff could have discovered and for which she was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position. *Aquinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1463, 1474 (10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1993).

Appendix B

In the instant case, Defendant did not bring forward any evidence indicating that other comparable positions were available for Plaintiff. Furthermore, the Court finds that there was evidence in the record to show that reasonable diligence was exercised by Plaintiff to mitigate her damages. Accordingly, the jury could properly find that Plaintiff mitigated her damages and was entitled to the back pay awarded.

Based upon the foregoing, Defendant's Motion for Judgment as a Matter of Law (Docket Entry #32) is DENIED.

ENTERED this 7th day of August, 1998.

s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT
JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED DECEMBER 16, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 97-CV-142-BU

MARY ELLEN KIRKLAND,

Plaintiff,

vs.

BAKER-HUGHES OILFIELD OPERATIONS, INC., d/b/a CENTRILIFT,

Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Mary Ellen Kirkland, recover of the defendant, Baker-Hughes Oilfield Operations, Inc., d/b/a Centrilift, the sum of $45,029.81, with interest thereon at the rate of 5.42 percent as provided by law, together with her costs and attorney's fees of action.

Appendix C

Dated at Tulsa, Oklahoma, this 16th day of December, 1997.

s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT
JUDGE

APPENDIX D — VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND NOVEMBER 21, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 97-CV-142-BU

MARY ELLEN KIRKLAND,

Plaintiff,

vs.

BAKER-HUGHES OILFIELD OPERATIONS, INC., d/b/a CENTRILIFT,

Defendant.

VERDICT

Please answer the following question.

1. Do you find by a preponderance of the evidence that the age of the plaintiff, Mary Ellen Kirkland, was a determining factor in the decision of the defendant Baker-Hughes Oilfield Operations, Inc., d/b/a Centralist to lay off the plaintiff?

Yes ✓ No _____

* * * *

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 31, 2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-5172

MARY ELLEN KIRKLAND,

Plaintiff – Appellee,

v.

BAKER-HUGHES OILFIELD OPERATIONS, INC., sued on original petition as: Baker-Hughes, Inc, a Delaware corporation d/b/a Centrilift,

Defendant – Appellant.

ORDER

Filed May 31, 2000

Before **TACHA** and **BRISCOE** Circuit Judges and **ROGERS**,† District Court Judge.

Mary Ellen Kirkland's petition for rehearing is denied.

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† The Honorable Richard D. Rogers, Senior District Judge for the District of Kansas, sitting by designation.

Appendix E

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: s/ [illegible]
Deputy Clerk